



Gen. Op. No. 10 - IB13

JOSEPH R. BIDEN, III  
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October 8, 2010

Sean O'Sullivan  
Courts Reporter  
The News Journal  
P.O. Box 15505  
Wilmington, DE 19850

RE: Appeal from Denial of Freedom of Information Act (FOIA) Records Request

Dear Mr. O'Sullivan:

On July 29, 2010 the Delaware Department of Justice ("Delaware DOJ") denied your July 14, 2010 FOIA request for the Delaware DOJ file concerning the arrest of James A. Higdon for driving while under the influence. The Delaware DOJ denied your request on the grounds that the information is either attorney work product, and therefore exempt under 29 *Del. C.* § 10002(g)(6), or a law enforcement investigative file, exempt under 29 *Del. C.* § 10002(g)(3). You have asked for a review of that denial, pursuant to 29 *Del. C.* § 10005(e). This is my determination of your appeal.

#### **FACTS**

James A. Higdon is the Sheriff of Kent County, Delaware. He was arrested and charged with Driving Under the Influence of Alcohol on May 29, 2010. As reported by the News Journal papers, on July 15, 2010, Mr. Higdon entered a guilty plea to the charge and he was sentenced

immediately thereafter. From the timing, it appears that your FOIA request was substantially contemporaneous with your reporting on the arrest and conviction for the News Journal papers. You have requested that the Delaware DOJ release its prosecution file relating to the prosecution of Mr. Higdon.

### LAW

We begin our analysis by reference to the FOIA statute itself. The "Declaration of Policy" set forth at 29 Del. C. §10001 states that "it is vital that citizens have easy access to public records in order that the society remain free and democratic" and that the FOIA law should be construed consistent with this purpose.

But not all "records" are "public records." 29 Del. C. §10002(g) carves out certain classes of documents that are not to be considered "public records" and are therefore exempt from disclosure. For our purposes, the obvious exemption comes in section 10002(g)(4) which exempts "criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. Any person may, upon proof of identity, obtain a copy of the person's criminal record. All other criminal records and files are closed to public scrutiny." The statute goes on to allow agencies with "criminal records" information to delete certain information before release of the record. *Id.*

Thus, the criminal records exemption of section 10002 makes a distinction between "criminal files" and "criminal records." While any person may obtain a copy of his/her criminal record, subject only to an agency's authority to withhold certain information contained in the

criminal record, "criminal files" are closed; there is no exception in the statute. Without question, the information sought here is the "criminal file" in the possession of the Department of Justice. We see no applicable exception in the statute.

The only characteristic of this criminal file that makes this request arguably different is the fact that the request came fast on the heels of the resolution of the criminal charge to which it relates. This may indeed vitiate to some extent the policy needs to retain the confidentiality of the file. Post adjudication, there is no longer a concern that the criminal prosecution might be somehow jeopardized by release of the criminal investigative report pretrial. But other policy concerns expressed by the statute remain. Witnesses frequently speak to authorities on condition of anonymity, or at least with an expectation that their information will be held in confidence with law enforcement. That expectation does not suddenly expire with the completion of the criminal case. In addition, criminal suspects are often arrested by law enforcement when they are not performing at their best. The embarrassment of their behavior often causes them to plead guilty rather than expose their misbehavior to public scrutiny. Thus, the privacy concerns of witnesses, informants and defendants themselves are each implicated by a reading of the statute that would except closed criminal files from the FOIA exemption for criminal files.

It would be naïve not to consider the broader implication of a reading of the FOIA statute that would terminate FOIA exemption of a criminal file at the conclusion of a criminal case. The request here is no different, so far as we can see, from one that might be made by anyone upon termination of a criminal case. Not only would the newspapers be entitled to the criminal file,

but so would the defendant, his friends, relatives, unindicted coconspirators, their attorneys and even the merely curious. We see a great potential for mischief in such a rule. When considered in that light, we are doubly confident that the General Assembly did not intend for criminal files to lose their FOIA exemption upon termination of the criminal proceeding.

Thus, we do not believe the reasons for the exemption from FOIA for criminal files pivots on the "pending trial" vs. "post adjudication" axis. Rather, as if a plain reading of the statute were not enough, there are sound and well considered policy reasons why criminal files should not lose their FOIA exempt status upon completion of the criminal case. If the General Assembly were to believe that the FOIA exemption for criminal files should end upon resolution of the criminal charges, it could certainly craft such a statute quite easily. It did not and we must conclude it did not intend to.

Other exemptions and other common law privileges come into play if the question here were not answered fully by the plain language of the statute. FOIA also exempts "records specifically exempted from public disclosure by statute or common law." 29 *Del. C.* § 10002(g)(6). The common law privilege for attorney work product applies to FOIA. *Op. Att'y Gen. 02-IB16*, 2002 WL 31031225 (Del. A.G. July 30, 2002). Thus, documents in the file containing an attorney's work product are not subject to FOIA.

The Delaware Rules of Criminal Procedure, Rule 16 specifically governs the materials contained within a criminal file that are to be disclosed to a criminal defendant. It is noteworthy that the criminal procedural rule does not call upon the state to disclose to the defendant the

entire content of the criminal file, but rather only those portions necessary to comport with due process. It strikes us as odd indeed that only certain information from a criminal file is to be made available to a criminal defendant whose liberty is on the line, but that the entire criminal file ought to be made available to him under a FOIA request after his conviction and sentencing.

In *Jacobs v. City of Wilmington*, 2002 WL 27817 (Del. Ch. 2002), Vice Chancellor Jacobs ruled in a case in which a local chiropractor sought copies of all traffic accident reports prepared by the Wilmington Police Department so that he could "cold call" the automobile drivers and offer his chiropractic services. The Court noted that 21 Del. C. §313(b) provides that traffic accident reports were required to be reported to the Department of Safety and Homeland Security, but that such reports "shall not be open to public inspection." On that basis, he denied the chiropractor's request. As it cannot be gainsaid that many traffic accidents are intertwined with driving under the influence arrests, it is difficult to conceive of a rule that would make a criminal report of a DUI arrest that did not cause an accident subject to FOIA but exempt one that did.

In *News Journal Co. v. Billingsley*, 1980 WL 3043 (Del. Ch. Nov. 20, 1980), the Delaware Association of Professional Engineers (DAPE) refused a FOIA request for a letter complaining about an engineer licensed by DAPE to practice in Delaware even though the investigation was closed. The Court affirmed the denial of the request, citing the "chilling effect upon those who might bring pertinent information to the attention of the Association." *Id.*, at \*3. These same policy considerations militate against permitting disclosure of the Higdon criminal

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file post adjudication. *See Atamian v. Bahar*, 2002 WL 264533 (Del. Super. Feb. 22, 2002).

### CONCLUSION

Although FOIA establishes a presumption of disclosure for "public records," that presumption is not applicable where the "record" is specifically excluded from the definition. Criminal files maintained by the Attorney General for prosecution clearly fit within the exemption from disclosure. Not only are these files not "public records" within the meaning of the statute, but there are good and sound policy considerations for excluding them from FOIA. We see nothing in either the language or the purposes for which FOIA was enacted that would support an exception to the exemption from disclosure for criminal files once the criminal charge has been disposed. Had the General Assembly intended to end the exemption from FOIA upon conclusion of the criminal case, it could have said so quite simply. Therefore, it is my conclusion that the Delaware DOJ has not violated FOIA by denying the News Journal's request for the Higdon criminal file.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charles E. Butler', with a stylized flourish at the end.

Charles E. Butler  
Chief Deputy Attorney General